IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,712

ANNA RUE CAMP and JOHN E. VENN,

Appellants,

v.

ST. PAUL FIRE AND MARINE INS. CO.,

Appellee.

ON QUESTIONS CERTIFIED BY THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
REPLY BRIEF OF APPELLANTS

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ARGUMENT

After years of litigation, St. Paul concedes (or at least assumes for the purposes of argument) that language in an insurance policy can create rights not recognized by the common law of bad faith, and concedes that an insurer should not escape liability if its conduct causes an insured to become bankrupt. See Answer Brief at 12-13, 41. Despite these concessions, St. Paul steadfastly maintains that it is immune from liability, and that such immunity is "good public policy."

One factual assertion raised by St. Paul merits correction. In addressing appellants' contractual and common law arguments, St. Paul continually states that its alleged bad faith behavior only took place in May of 1987, just before Mrs. Camp obtained a judgment of over $3 million against Dr. Kimbell. See Answer Brief at 6, 30, 44 n. 31. Remarkably, St. Paul says that "it is uncontroverted that the alleged breach of contract by St. Paul occurred at the time of St. Paul's rejection of Mrs. Camp's last policy limits settlement offer." Id. at 30 (emphasis added). St. Paul wishes this Court to believe that the alleged bad faith took place after Dr. Kimbell's bankruptcy discharge so that it can more easily present its argument that St. Paul's conduct was not a cause of the bankruptcy.

St. Paul, however, is mixing apples and oranges. Although a bad faith action only accrues upon the rendition of the excess judgment, Blanchard v. State Farm Mutual Automotive Ins. Co., 575 So.2d 1289, 1291 (Fla. 1991), the accrual of the bad faith action has nothing to do with when the insurer's bad faith conduct took place. Similarly, the timing of the insurer's last rejection of the plaintiffs settlement offer does not fix the date of the insurer's bad faith behavior. See generally Powell v. Prudential Property & Casualty Ins. Co., 584 So.2d 12, 14 (Fla. 3d DCA 1991)("The lack of a formal offer to settle does not preclude a finding of bad faith. . . . Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause.").

It has always been appellants' position that St. Paul acted in bad faith well before Dr. Kimbell's bankruptcy, and St. Paul's attempts to suggest otherwise are disingenuous. As explained by the Eleventh Circuit, St. Paul twice rejected Mrs. Camp's offers to settle for the policy limits prior to Dr. Kimbell's filing for bankruptcy. By the time of the second rejection, St. Paul had known of Mrs. Camp's claim for two years, Mrs. Camp's lawsuit against Dr. Kimbell had been pending for 17 months, and Dr. Kimbell had not yet filed for bankruptcy. See 968 F.2d 340, 341-42 (11th Cir. 1992).[1/]

I. BY INSERTING THE BANKRUPTCY CLAUSE IN DR. KIMBELL'S POLICY, ST. PAUL WAIVED *ANY* CONTENTION THAT DR. KIMBELL'S BANKRUPTCY PROVIDES IMMUNITY FROM BAD FAITH LIABILITY

St. Paul says that it "welcomes" the opportunity to discuss the application of contract principles to this case, and specifically to the bankruptcy clause in Dr. Kimbell's insurance policy. Unfortunately, St. Paul's promise to address the contract issue on its own terms is an empty one. After discussing the cases relied on by appellants, St. Paul again returns to the common law question, arguing that appellants do not have a bad faith action under <u>Fidelity & Casualty Co. of New York v. Cope</u>, 462 So.2d 469 (Fla. 1986). <u>See</u> Answer Brief at 18-19. St. Paul's need to resort to the common law when discussing contract principles demonstrates that St. Paul has no valid arguments on the contract interpretation question certified to this Court.

The few arguments that St. Paul does make on the contract question are not persuasive. For example, St. Paul spends four pages of its brief arguing that the Minnesota law cited by appellants is not controlling. Appellants agree that the

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1/ Not surprisingly, St. Paul's statement of the facts omits any reference to St. Paul's improper conduct, completely ignores all of the relevant evidence submitted by appellants on the question of causation, and treats disputed facts as uncontroverted.

Minnesota law is not dispoaitive; by discussing the Minnesota statute, Minn. Stat. Ann. § 60A.08(6), and Minnesota case law appellants demonstrated that prior to issuing Dr. Kimbell's policy St. Paul (a Minnesota-based company) was on notice that language essentially identical to St. Paul's bankruptcy clause had been interpreted in its home state as permitting a bad faith action notwithstanding the insured's financial condition.

St. Paul also asserts that the bankruptcy clause only refers to the duty to defend and pay the policy limits. Not only is this assertion not supported by any authority, but it is directly at odds with the position St. Paul took in the Eleventh Circuit. Before the Eleventh Circuit, St. Paul conceded that the "bankruptcy clause refers to more than payment of the policy limits" and that it was not "relieved of its obligations under the insurance policy by virtue of Dr. Kimbell's bankruptcy." See St. Paul's Answer Brief in the Eleventh Circuit at 10, 12. Moreover, St. Paul's interpretation of the bankruptcy clause as limited to providing a defense and paying the policy limits fails to take into account the long-established rule that provisions in insurance policies are construed strictly against the insurer. See, e.g., Nixon v. U.S. Fidelity & Guaranty Co., 290 So.2d 26, 29 (Fla. 1973). St. Paul's brief, like the district court's opinion, is devoid of any discussion of this rule or its application to the bankruptcy clause.

The only attack that St. Paul can mount on cases like Maguire v. Allstate Ins. Co., 341 F.Supp. 866 (D. Del. 1972), Torrez v. State Farm Mutua1 Automobile Ins. Co., 705 F.2d 1192 (10th Cir. 1982), and Ganaway v. Shelter Mutua1 Ins. Co., 795 S.W.2d 554 (Mo. App. 1990) -- the only cases directly on point -- is to say that the facts of those cases are distinguishable and that the cases are from other jurisdictions. See Answer Brief at 15-17. Neither of these arguments has any merit. First, no two cases present identical facts. The important question is whether the relevant facts are the same or similar, and the district court noted that the "wording in the two policy clauses involved in [Maguire and Torrezl was almost identical to the corresponding clause in [Dr.] Kimbell's policy." 127 B.R. 879,885 (N.D. Fla. 1991). The same is true of the wording in the clause in Ganawav. Second, that Maguire, Torrez and Ganaway are from other jurisdictions is no revelation. As the district court recognized and the Eleventh Circuit certified, this is a case of first impression in Florida. Thus, it is either authority from other jurisdictions or - as in much of St. Paul's argument - no authority at all, that this Court must resort to.

St. Paul further attempts to distinguish Ganaway on the ground that in Missouri, unlike Florida, an action for bad faith sounds in tort and not in contract. This distinction, however, actually supports appellants' argument regarding the bankruptcy clause. If the Missouri Court of Appeals found that a contractual provision controlled even though bad faith is a tort in Missouri, the argument for interpreting the bankruptcy clause in Dr. Kimbell's policy to permit a bad faith action is stronger because under Florida law a bad faith action sounds in contract.

II. UNDER FLORIDA COMMON LAW ST. PAUL IS NOT CLOAKED WITH ABSOLUTE IMMUNITY FROM A BAD FAITH CLAIM AS A RESULT OF DR. KIMBELL'S FORTUITOUS BANKRUPTCY

Almost apologetically, St. Paul says over and over again that it is not advocating a rule that would provide immunity to an insurer from a bad faith action whenever its insured becomes bankrupt -- as if by repetition alone, the statement might become true. See Answer Brief at 6, 7, 19. Whatever St. Paul's intentions may be, the inescapable conclusion is that immunity will always result if St. Paul's position becomes the law.

St. Paul's blanket bankruptcy exception to bad faith liability seems quite likely to "encourage reckless behavior" since insureds facing judgments in excess of their insurance are quite likely to seek bankruptcy protection. If St. Paul's position becomes the law those insureds can obtain a discharge in bankruptcy relieving them from liability for the excess judgment and enforce Florida Statute § 56.146

with "the same effect as a satisfaction of judgment." Knowing the likelihood that insureds - especially individual insureds like physicians - facing uninsured liability will file for bankruptcy, insurers have every incentive to ignore their duty to act in good faith just as St. Paul did in this case.

A A Bad Faith Action Can be Maintained Under Cope Because Dr. Kimbell's Estate Remains Liable for the Excess Judgment

St. Paul argues that Dr. Kimbell's bankruptcy estate does not own the bad faith cause of action because the cause of action accrued after the filing of the bankruptcy petition. See Answer Brief at 28-35. This argument is flat out wrong. St. Paul chooses to ignore all of the federal authority cited in appellants' brief, see Initial Brief at 19-20, and instead cites cases and statutes dealing only with property existing at the time of the bankruptcy petition. There is a plethora of authority, both case law and statutory, which holds that the bankruptcy estate includes every interest of the debtor (even if potential or contingent) acquired after the filing of the bankruptcy petition. See, e.g., Palmer v. Travelers Ins. Co., 319 F.2d 296,297,299-300 (6th Cir. 1963)(bankruptcy estate owned debtor's contingent cause of action for bad faith even though cause of action only accrued after the filing of the bankruptcy petition); 11 U.S.C. § 541(a)(7) (bankruptcy estate includes "any interest in property that the estate acquires after the commencement of the case").[2]

A related argument advanced by St. Paul is that Mr. Venn, the bankruptcy trustee, abandoned the bad faith claim. This argument, too, is meritless. First, there has been no finding by any court that Mr. Venn abandoned

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[2] St. Paul's claims adjuster admitted at his deposition that it is important for someone standing in the shoes of an insured (like a bankruptcy trustee) to know about the chances of prevailing at trial and the likely verdict that will be rendered. R. II:111 at 141, 143 (Barnhardt deposition).

the bad faith claim. Second, Mr. Venn never made a formal request for abandonment of the policy or the potential bad faith claim, and there was no notice of or hearing on his intent to abandon such property. Mr. Venn only stopped trying to assert "control" over the policy proceeds (which were only $250,000) when the bankruptcy court told him he could not exercise control. R. II:110 at 58 (Venn deposition). As a result, there was no abandonment as a matter of law. 11 U.S.C. § 554(a), (b). See In re Sire Plan, Inc., 100 B.R. 690, 693 (Bankr. S.D.N.Y. 1989) (trustee's intent to abandon property must be clear and unambiguous and would not be inferred from report of trustee that property had no value). Moreover, there was no "automatic" abandonment under 11 U.S.C. § 554(c) because Dr. Kimbell did not list his policy as an asset in his bankruptcy schedules. See R. II:110 (Venn deposition).

One of the last arguments made by St. Paul is that the bankruptcy estate cannot have any greater rights than those held by Dr. Kimbell. See Answer Brief at 34-37. As explained below, this argument, rather than supporting St. Paul's position, demonstrates the correctness of appellants' arguments and shows why Fidelity and Casualty Co. of New York v. Cope, 462 So.2d 459 (Fla. 1985), is not controlling.

At the time of the filing of the bankruptcy petition, all of Dr. Kimbell's property interests (whether present, potential, or contingent) passed to the bankruptcy estate. Thus, the bankruptcy estate owned the potential bad faith claim as of July 11, 1986. Because the bad faith claim no longer belonged to Dr. Kimbell, the fact that he was personally discharged from liability to Mrs. Camp at a later date is irrelevant for purposes of determining whether his estate can now bring a bad faith claim. It is the estate that owned the cause of action for bad faith, and it is the estate that is currently liable for the $3 million excess judgment. To the extent that this Court evaluates the "harm" caused by the excess judgment under Cope, the bankruptcy estate's liability for the excess judgment provides the necessary harm for prosecution of a bad faith claim against St. Paul,

B. A Holding that an Insured's Bankruptcy Precludes a Bad Faith Action Would be Bad Public Policy and Would Encourage Reckless Behavior by Insurers

St. Paul starts its "good public policy" argument by conceding that the Second Circuit decision in Harris v. Standard Accident & Insurance Company, 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962), creating a blanket bankruptcy exception, is bad public policy and attempts to demonstrate that the trial court's summary judgment ruling really is not based on the Harris decision. See Answer Brief at 40, St. Paul's belated attempt to distance itself from the public policy implications of the Harris opinion is at least ironic given St. Paul's earlier lengthy explanation of how it contends Harris is "in harmony" with St. Paul's interpretation of Cope, Clement and "the present case." Answer Brief at 26-27.

More fundamental than St. Paul's clumsy sleight of hand with the Harris opinion is the inescapable conclusion that St. Paul's public policy "argument" contains no reasoning. St. Paul's public policy "argument" is nothing more than an unexplained assertion that the judicial granting of a blanket bankruptcy exception to bad faith liability "would not encourage any reckless behavior by insureds [sic]." But St. Paul does not offer a single example of a situation in which an insured would suffer bankruptcy and yet the insurer would still be obligated to act in good faith if St. Paul's position becomes the law. The effect of a bankruptcy discharge under federal and Florida law ensures that insurers will be immune from bad faith liability. See 11 U.S.C. § 727(b); Fla. Stat. § 55.145.

Moreover, under St. Paul's proposed blanket bankruptcy exception, the predictable windfall of the insured's bankruptcy apparently erases liability for bad faith which occurred even before the insured obtains a bankruptcy discharge and even before the insured even files for bankruptcy. St. Paul argues throughout its brief that it should not be held liable because the judgment against Dr. Kimbell was not entered until after he filed for bankruptcy. See Answer Brief at 19-20, 26, 29-30. "This is necessarily the case because the cause of action, if any, arose months after Dr. Kimbell filed his bankruptcy petition, to wit, at the time judgment was rendered in the state court." Answer Brief at 29-30. Even though St. Paul had notice of Dr. Kimbell's malpractice 24 months before he filed for bankruptcy, even though it refused reasonable settlement offers long before Dr. Kimbell filed for bankruptcy, and even though it unreasonably delayed investigation of the claim before Dr. Kimbell's bankruptcy, St. Paul argues it should suffer no consequences because a judgment against Dr. Kimbell was delayed until after Dr. Kimbell filed for bankruptcy.

Notwithstanding St. Paul's protestations to the contrary, St. Paul's own conduct in this case demonstrates that the creation of a bankruptcy loophole will provide a powerful incentive for insurers to seek the bankruptcy windfall rather than honestly and fairly investigate claims. For when, after months of delay, St. Paul finally recognized that Mrs. Camp had a legitimate claim against Dr. Kimbell, St. Paul began to search desperately for a straw to grasp that would permit it to avoid that claim. Even with no clear law providing a bankruptcy loophole, St. Paul seized upon Dr. Kimbell's potential bankruptcy as a means to avoid its responsibility to pay Mrs. Camp's valid claim.

On August 6, 1985 -- one year before Dr. Kimbell filed for bankruptcy -- St. Paul was thinking not about the legitimacy of the claim, but of dodging its responsibility to pay. St. Paul's claims adjuster wrote, "we need to find out what effect ins[ured]'s bankruptcy would have on potential excess verdict." R. IV: 141, Exhibit 33. As liability became even more obvious, St. Paul became even more desperate to find some way to avoid paying for the brain damage suffered by Mrs. Camp. Six months before Dr. Kimbell filed for bankruptcy, St. Paul chose to ignore the total collapse of any semblance of a defense to Mrs. Camp's claim and focused instead on the possibility of a bankruptcy loophole that would give St. Paul comfort in its continuing refusal to settle Mrs. Camp's claim. St. Paul's claims adjuster wrote, "Instruct [defense lawyer] to research [and] report to us how ins[ured]'s bankruptcy affects our case. When we have that we can decide on future tactics!" R. IV.:141, Exhibit 49 (exclamation point in original).

Nothing speaks more powerfully to "encouraging reckless behavior" than St. Paul's own deeds in this very case. When St. Paul should have been pondering its responsibility for claims against Dr. Kimbell, it chose instead to seek out "tactics" which hinged not on the legitimacy of the claims, but on Dr. Kimbell's precarious finances. That St. Paul should embrace this course when there was no hint that Florida law supported such a loophole renders utterly specious St. Paul's self-serving protestations about the purity of an insurer's motives.

Sound public policy demands that insurers evaluate settlement based on the merits of claims, and not upon the deterioration of the finances of insureds.

III. THE INSURED'S BANKRUPTCY SHOULD NOT BAR A BAD FAITH ACTION IF THE INSURER'S ACTIONS WERE A SUBSTANTIAL FACTOR IN THE BANKRUPTCY

St. Paul has apparently abandoned its argument that it is immunized from bad faith liability even if it caused Dr. Kimbell's bankruptcy. St. Paul notes delicately that "[t]he district court found precedent for the proposition that if an insurer filed bankruptcy because of the entry on an excess judgment, the insurer could be responsible to the insured for damages sustained." Answer Brief at 42. Thus, St. Paul devotes its energies to defending the trial court's determination that there was no evidence creating a genuine issue of material fact with respect to the cause of Dr. Kimbell's bankruptcy. See Answer Brief at 42-47.

There exists in the record only one piece of direct evidence on the cause of Dr. Kimbell's bankruptcy filing which was created without the benefit of litigation hindsight and an eye toward St. Paul's bankruptcy loophole. More than one vear before Dr. Kimbell filed for bankruptcy, Dr. Kimbell's lawyer wrote St. Paul and informed it that "[o]bviously, the potential exposure beyond insurance is a factor in our decision on filing some type of bankruptcy proceedings." R.IV:141, Exhibit 18. According to St. Paul, this letter "does not constitute credible evidence" and was properly rejected by the trial court at the summary judgment stage because it was outweighed by St. Paul's contrary evidence of causation. Answer Brief at 44-47 & n. 31.

It has long been "settled that in passing upon a motion for summary judgment requiring an evaluation of the facts, neither the [trial] court below, nor this court, is permitted to pass upon the credibility of the witnesses or the comparative weight of the evidence." Williams v. Board of Public Instruction, 61 So.2d 493 (Fla. 1952). See also United States v. Four Parcels of Real Property, 941 F.2d 1428,1437 (11th Cis. 1991)("Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.") (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986)). That St. Paul must argue that appellants' evidence is not "credible" and so should be rejected in favor of St. Paul's interpretation of other evidence demonstrates that the judgment below is built upon the weakest of foundations, and that St. Paul's argument is meritlesa.

St. Paul has marshalled a detailed explanation from which a jury might infer that other factors besides St. Paul's calculated delay in paying Mrs. Camp's claim might have caused Dr. Kimbell's bankruptcy. But St. Paul offers nothing to refute the genuineness of the letter from the lawyer who eventually filed Dr. Kimbell's bankruptcy stating that the potential excess judgment was "obviously a factor" in the decision to file for bankruptcy, or the other evidence set out in appellant's initial brief (including Mr. Venn's direct testimony that St. Paul's actions caused the bankruptcy). St. Paul only argues that its evidence is stronger. Perhaps St. Paul is right. Perhaps its evidence is stronger, weightier, and more credible than the plaintiffs evidence. But if that is so, the decision is for the jury and not for the judge on summary judgment. Appellants carried their burden by presenting evidence that St. Paul's bad faith was a substantial factor causing Dr. Kimbell's bankruptcy. Now the jury must be permitted to decide.[3/]

CONCLUSION

For the reasons set forth above and in appellants' initial brief, the Court should answer the first certified question "no" and the second certified question "yes." If this Court disagrees with appellants on both of these questions, it should hold, as St. Paul has conceded, that an insurer can be sued for bad faith if its actions have been a substantial factor leading to the insured's bankruptcy. It should also rule that Mrs. Camp's action against St. Paul under Fla. Stat. § 624.155 is unaffected by Dr. Kimbell's bankruptcy.

Respectfully submitted,

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3/ With respect to point V of St. Paul's brief regarding Mrs. Camp's direct action, appellants rely on their arguments contained in the Initial Brief of Appellants at pages 31-32.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of appellants' reply brief was served by U.S. Mail this 24th day of August, 1992, on Elmo Hoffman, Esq., Brownlee, Hoffman, & Jacobs, P.A., 255 S. Orange Avenue, Suite 1390, Orlando, Florida 32801; Gus Small, Esq., and William Reedy, Esq., Small, White, & Morani, P.C., 2970 Peachtree Road, N.W., Suite 400, Atlanta, Georgia 30355; and Joel Perwin, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin, & Perwin, P.A., 25 W. Flagler Street, Suite 800, Miami, Florida 33130.

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